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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 725

NICK TEDESCO,

vs.

BOARD OF SUPERVISORS OF ELECTIONS FOR THE PARISH OF ORLEANS, ET AL.

STATEMENT AS TO THE JURISDICTION OF THE UNITED STATES SUPREME COURT ON APPEAL TO REVIEW THE JUDGMENT IN QUESTION.

The appellant, having presented this day his petition for appeal, now files this his statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on appeal to review the final judgment in question, and should exercise such jurisdiction in this case.

(a) Title 28 Sec. 1257 U. S. C. A. provides that final judgments rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court of the United States by appeal where there is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of its validity.

(b) The Constitution of the State of Louisiana, Art. 7 Sec. 29 provides that the Courts of appeal shall have appellate jurisdiction which shall extend to all cases of which the Civil District Court for the Parish of Orleans has exclusive jurisdiction and of which the Supreme Court is not given jurisdiction. Art. 7, Sec. 78 provides that appeals from the Parish of Orleans shall be to the Court of Appeal for the Parish of Orleans.

The appellate jurisdiction of the Supreme Court of Louisiana is defined by said Constitution in Art. 7 Sec. 10. It does not include appeals from judgments of the District Courts in which a State law has been declared to be constitutional. Consequently, the Court of Appeal for the Parish of Orleans had jurisdiction of the appeal from the Civil District Court for the Parish of Orleans where the State statute was held not to violate the Constitution of the United States nor the Constitution of the State of Louisiana.

Art. 7 Sec. 11 of the Constitution of Louisiana provides that the Supreme Court of Louisiana may require by writ of certiorari any case to be certified from the Courts of Appeal to it for a review provided that application be made therefor within thirty days after a rehearing shall have been refused by the Court of Appeal. Judgments of the Courts of Appeal in cases in which application is made for a writ of review, become executory when the writ is refused by the Supreme Court.

(c) The Legislature of the State of Louisiana enacted Act 234 of 1948 at the Regular Session of that year which is published in Volume One of the acts of the State of Louisiana, Regular Session 1948 at page 574. This statute amended the Charter of the City of New Orleans, Act 159 of 1912, in the following manner:

1. It amended Section 3 of the Charter so as to provide that the electors of New Orleans shall vote for a Mayor at

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large and that one of the seven Commission Councilmen shall be elected from each of the seven Municipal Districts of the City. (All members of the Commission Council had previously been elected at large.) It further provided that the Mayor shall be elected by a majority of a city-wide vote and that each of the Commission Councilmen shall be elected by a majority vote cast in each of their several Municipal Districts.

2. It amended Section 4 of the Charter to provide that the Mayor shall have the right to make all appointments to Boards and Commissions made necessary by law subject to the approval of a majority vote of the Commission Council. In the event that a nominee of the Mayor does not receive a majority vote for confirmation nominations for such appointments shall be received from any member of the Council and such a nominee shall be considered the appointee when confirmed by a majority vote of the Council.

3. It further amended Section 4 of the City Charter to provide that the executive and administrative powers, authority and duties in said city shall be distributed among eight departments.

4. It amended Section 12 of said Charter to provide that the Mayor shall be the Commissioner of the Department of Public Affairs and that the Council shall designate by a majority vote one Commission Councilman to head each of the seven other departments. It grouped the following subdivisions of government under the eight departments:

Under the Department of Public Affairs:

1. Law and Judicial.
2. Civil Service.
3. Publicity.

Under the Department of Public Finance:

1. Assessment of private property.
2. Receipts and expenditures of public money.
3. Accounts of public moneys.

Under the Department of Public Safety:

1. Fire prevention and relief.
2. Police.

Under the Department of Public Utilities:

1. Public service and utility corporations.
2. Franchises.

Under the Department of Public Streets:

1. Paving and repairs of Streets, Alleys, Bridges, Sidewalks, etc.

Under the Department of Public Sanitation:

1. Garbage disposal.
2. Street cleaning.

Under the Department of Public Buildings and Parks:

1. Parks and Playgrounds.
2. All public buildings and public property.

Under the Departments of Institutions and Public Health:

1. Public Health.
2. Charity and relief.
3. Public and private markets.
4. Public baths.

5. It amended Section 9 of said Charter to provide that, when the Commission Council is constituted of eight Coun-

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cilmen, five members shall constitute a quorum and the affirmative vote of five members shall be necessary to adopt any motion, resolution or ordinance. The Mayor is given the power of veto but a measure may be passed over his veto by a vote of three-fourths of the members.

(d) Under the Charter of the City of New Orleans, as it exists prior to the effective date of the amendments enacted by said Act 234 or 1948, the City of New Orleans is governed by a Mayor and four Commissioners, all of whom are elected by the voters of the entire city. The administration is divided among the said five Councilmen, all of whom are elected at large. The members of the State Legislature from New Orleans are elected by wards, some of the wards being grouped together for the election of Senators. Only assessors were elected by municipal districts.

(e) Appellant alleged in the petition filed by him in the Civil District Court for the Parish of Orleans:

1. That he is a resident of the Third Municipal District of the City of New Orleans.

2. That he is a qualified voter, duly registered as such in Ward Nine of said City.

(Paragraphs 3, 4 and 5 relate to provisions of the Constitution of Louisiana. They are not relevant to this appeal except that they designate the act to which the petition refers, namely, Act 234 of the Regular Session of the Louisiana Legislature of 1948.)

6. That said act abridges the privileges and immunities of petitioner as a citizen of the United States, residing in the City of New Orleans, State of Louisiana, in that it deprives him of the privilege of voting for six of the com-

missioners, who are each vested with the administration of one of the eight Departments, among which the executive and administrative powers of said City are divided. That it, thereby, deprives him of the immunity from being governed by officials who do not represent him and who are not responsible to him as a voter. Wherefore, the said act violates the provisions of the Fourteenth Amendment of the Constitution of the United States.

7. That said act deprives petitioner of his liberty and property without due process of law in that residents of other districts, namely the first, second, fourth, fifth and seventh districts of the City of New Orleans are given greater representation in the Commission Council of the City of New Orleans; in that approximately one-half of the people in the City of New Orleans, residing in the Third and Sixth Districts of said City, are to be represented by only two-sevenths of the Commissioners to be elected under said act. Wherefore said act contravenes the provisions of Amendment XIV of the Constitution of the United States and Art 1 Sec. 2 of the Constitution of the State of Louisiana.

(Paragraphs 8 and 9 are not relevant to this appeal.)

10. That in accordance with the law of Louisiana, the next general election of a Mayor and members of the Commission Council of the City of New Orleans will be held on the Tuesday following the first Monday in April, 1950.

11. That the Board of Supervisors of Elections in and for the Parish of Orleans are required by law to give notice of said election and to appoint commissioners of election at each precinct in the City of New Orleans.

12. That the Board of Supervisors of Elections for the Parish of Orleans when this petition was filed consisted of

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Hon. William F. Conkerton, who is President of the Board; William S. Farrell, who is the Registrar of Voters for the Parish of Orleans and Louis Knop, Jr. who was the Civil Sheriff for the Parish of Orleans.

13. That despite the manifest unconstitutionality of Act 234 of 1948, the Board of Supervisors of Elections in and for the Parish of Orleans will conduct an election in accordance with said act unless said statute has been judicially declared to be unconstitutional.

Appellant prayed in said petition that judgment be rendered in his favor and against the Board of Supervisors of Elections for the Parish of Orleans, Hon. William F. Conkerton, Hon. Louis Knop, Jr. and William S. Farrell, declaring Act 234 of the Regular Session of 1948 of the Legislature of Louisiana to be unconstitutional and void.

In accordance with the Louisiana Declaratory Judgment Act, the Attorney General of the State of Louisiana was served with a copy of this petition in order that he might be heard on the issues presented.

Exceptions and an answer were filed on behalf of the defendant by the Attorney General, 2d Assistant Attorney General and Special Assistant to Attorney General.

At the trial of the case, there was introduced in evidence, on behalf of appellant, Vol. 1 of the Sixteenth Census of the United States, 1940 Population. On page 442 of this volume it appears that the population of the wards of the City of New Orleans in 1940 was: Ward 1, 15801; Ward 2, 17181; Ward 3, 40133; Ward 4, 23206; Ward 5, 29093; Ward 6, 17337; Ward 7, 51861; Ward 8, 32090; Ward 10, 24875; Ward 11, 35190; Ward 12, 35118; Ward 13, 28006; Ward 14, 35689; Ward 15, 20720; Ward 16, 16287; Ward 17, 25388; total population of City 494,537. The First Muni-

cipal District is constituted of Yards 1, 2 and 3; the Second Municipal District of Wards 4, 5 and 6; the Third Municipal District of Wards 7, 8 and 9; the Fourth Municipal District of Wards 10 and 11; the Fifth Municipal District of Ward 15, alone; the Sixth Municipal District of Wards 12, 13 and 14 and the Seventh Municipal District of Wards 16 and 17.

In compliance with a writ of subpoena duces tecum, William S. Farrell, Registrar of Voters produced a compilation of the total registration for the City of New Orleans for the period from January 1, 1940 through November 2, 1948, when the rolls were closed for 1948, and for the period from January 1, 1949 to October 28, 1949, the latest compilation at the time of the trial of this case in the District Court. These compilations were introduced in evidence and were as follows:

I

January 1, 1940, Through November 2, 1948

Ward— 1	4,672	
Ward— 2	4,694	
Ward— 3	15,468	
		24,834
Ward— 4	13,048	
Ward— 5	10,453	
Ward— 6	6,367	
		29,868
Ward— 7	19,221	
Ward— 8	19,021	
Ward— 9	21,169	
		59,411
Ward—10	9,328	
Ward—11	10,214	
		19,542
Ward—12	14,522	
Ward—13	12,262	
Ward—14	19,758	
		46,542
Ward—15	8,812	
		8,812
Ward—16	7,159	
Ward—17	12,268	19,427
	208,436	208,436

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II

January 1, 1949, Through October 28, 1949

Ward— 1	3,795	
Ward— 2	4,262	
Ward— 3	11,192	
		19,249
Ward— 4	10,206	
Ward— 5	8,383	
Ward— 6	4,823	
		23,412
Ward— 7	15,882	
Ward— 8	14,309	
Ward— 9	17,829	
		48,020
Ward—10	7,539	
Ward—11	8,841	
		16,380
Ward—12	10,207	
Ward—13	8,484	
Ward—14	14,223	
		32,914
Ward—15	8,508	
		8,508
Ward—16	5,255	
Ward—17	9,236	14,491
	162,974	162,974

(f) The Civil District Court rendered judgment in favor of defendants, holding that said Act 234 of 1948 was not in conflict with the Constitution of the United States. An appeal was taken to the Court of Appeal for the Parish of Orleans. The judgment of the Civil District Court was affirmed by the Court of Appeal on December 12, 1949. Appellant timely applied for a rehearing, which was refused on January 3, 1950. Appellant timely filed a petition for a writ of certiorari in the Supreme Court of Louisiana. This writ was refused on February 13, 1950. No further recourse is available to petitioner in the Courts of the State of Louisiana.

(g) The decision of the Court of Appeal for the Parish of Orleans is published in 43 So. 2d 514. It holds (page 517) that there is nothing in the Federal Constitution nor in the amendments which prohibits unfair discrimination, unless it be where a Federal election is involved, or unless

it be where there is a discrimination which is expressly prohibited by the Fifteenth Amendment or by the Nineteenth Amendment. Reliance is placed on *Minor* v. *Happersett*, 21 Wall. 162, 88 U. S. 162; *United States* v. *Cruikshank*, 92 U. S. 542 and *United States* v. *Reese*, 92 U. S. 214.

This decision of the Court of Appeal further holds that there is no fundamental right in every citizen to vote for every person who may aspire to public office, giving as instances of elections from different districts the manner of electing judges and Railroad Commissioners and stating that there are probably many other instances in which boards or commissions are composed of members elected from different districts where the voters of one district vote only for one member but are subject to the rulings of the entire body.

This decision concedes that there may be a violation of the fundamental rights of the various voters where a statute arbitrarily and without sound reason divides a municipality into districts as was done by Act 234 of 1948; but it holds, nevertheless, that "Whatever may have been the real reason which lay back of the enactment of this statute, whether the reason was political or whether it was punitive, we must assume that the Legislature acted properly and on sound reason."

This decision concludes that there is nothing in the statute violative of the Federal Constitution nor of the amendments thereof.

(h) Appellant seeks to show that the provisions of the act in question offend the common standards of justice and fairness; that it arouses a sense of injustice in that it departs from the standards established by Section 1 of the Fourteenth Amendment.

The practice of electing members of a legislature, of a court and of a regulatory commission by districts is well

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established but no precedent has been found for the election of an executive to administer the affairs of an entire city from one part of the city. The members of legislatures, courts and commissions do not act singly, the action of these bodies being taken by a majority vote. Thus all qualified citizens participate by representation. Under Act 234 of 1948 the administration of government in the Third District, it being part of the City of New Orleans, is departmentized. The electors of the Third District participate in the election of the Mayor and one Commissioner. If the Commissioner elected from the Third District is assigned by the majority of the Council to the Department of Public Utilities or to the Department of Public Buildings and Parks, the voters of the Third District will have no voice in the policing of the City, fire prevention, paving and repair of streets, garbage disposal, street cleaning or public health. The Commissioner of Public Safety may fail to provide the citizens of the Third District with police protection or protection from fire and nevertheless be re-elected from the district where he resides. The chaos likely to be caused by this act can be envisaged if we were to conceive of each member of Congress administering a separate bureau, with the Commissioner of Internal Revenue elected by the voters of Mississippi and the Secretary of the Navy by the voters of Colorado.

Other problems are presented by the disparate representation of voters in different segments of the City. When the registration rolls were closed in 1948 the distribution of voters was as follows:

District	Number of Voters	Percentage of Total Registration
First	24,834	11.9
Second	29,868	14.3
Third	59,411	28.5
Fourth	19,542	9.5
Sixth	46,542	22.3
Fifth	8,812	4.2
Seventh	19,427	9.5

It is conceded that the right of suffrage is not a necessary attribute of citizenship, *Minor* v. *Happersett, United States* v. *Cruikshank, United States* v. *Reese;* but it does not follow that a state can wantonly discriminate against some of its citizens without a reasonable basis of classification. The Fifteenth and Nineteenth Amendments eliminated bases of classification theretofore considered reasonable.

Reliance is placed by petitioner upon the decisions in the cases of *Nixon* v. *Herndon, et al.,* 273 U. S. 536, 47 S. Ct. 446; *Smith* v. *Allwright,* 321 U. S. 649, 64 S. Ct. 757 and the subsequent decisions considering unjustified discrimination.

Discrimination against voters can vary in form. It need not be based upon race or color to violate the constitutional rights and privileges of the citizen. The Commissioners of Elections for the Second Congressional District of Louisiana were indicted in 1940 for frauds in a primary of the Democratic Party. The District Court sustained a demurrer on the grounds that the statute did not apply to the offenses charged and that the statute, Sections 19 and 20 of the Criminal Code, was not sanctioned by the United States Constitution. The Supreme Court in *United States* v. *Classic, et al.,* 313 U. S. 299, 61 S. Ct. 1031 reversed the District Court. This decision reaffirms the principle that qualified voters have a right to cast their ballots and have them counted. Justice Douglas dissented on the ground that Sec. 19 of the Criminal Code was inapplicable, but agreed in the opinion that Congress had the constitutional power to provide penalties for the interference with the privilege of voting for representatives and of having the votes counted. Thus it should be noted that the justices of the United States Supreme Court were unanimously of the opinion that the voters had the constitutional right to have their votes counted properly.

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A similar situation was considered by the United States Supreme Court in *Colegrove, et al.* v. *Green, et al.*, 328 U. S. 549, 66 S. Ct. 1198 (1946). The controlling opinion is expressed by Justice Rutledge. Three residents of Illinois Congressional Districts having a much larger population than other districts filed suit against the members of the Illinois Primary Board in a Federal District Court to have declared invalid the holding of an election in November, 1946 under the Illinois Laws of 1901. The apportionment had been approximately in proportion to population when made in 1901, but the population of some districts had increased rapidly while that of others had declined. As a result of this uneven increase in population, the most populous district had a population in 1946 of 914,053, and the smallest had a population of 112,116. The majority of the Court was of the opinion that it was not feasible for the Court to remap the Illinois districts so as to bring them more in conformity with a standard of fairness for a representative system. Justice Rutledge expressed the opinion that because of the shortness of the time remaining before the election and the difficulties involved in the interference by the Court in the functions of state officials and Congress the Court should decline to exercise its jurisdiction. In the opinion of Justice Frankfurter, in which Justice Reed and Justice Burton concurred, the question was deemed nonjusticiable. Justice Black was of the opinion that petitioners had been deprived of the equal protection of the laws and were entitled to equitable relief. He declared that the equal protection clause would invalidate a law which would expressly give certain citizens a half vote and others a full vote. He considered that the votes of some citizens would be only one-ninth as effective as the votes of other citizens. He was further of the opinion that the reduction of the effectiveness of petitioners votes abridged their

privilege as citizens. Justice Douglas and Justice Murphy joined in the dissent of Justice Black. Thus it appears that the majority of the Court was of the opinion that the issue was justiciable, but one of the four judges constituting this majority was of the opinion that the Court should refuse to exercise its discretion because of the difficulties involved.

None of the difficulties involved in *Colegrove, et al.* v. *Green, et al.*, exist in the case before this Court. There is no need of affirmative legislative action to redistrict an entire state. The division of Illinois into districts was originally in conformity with the last census taken before the time when the districts were established. In the present cause the City of New Orleans has a charter which has been approved by the vote of its people. No enforcement problem is involved in maintaining this charter against the unconstitutional attack of the Legislature.

Some of these problems are considered by Arthur E. Sutherland, Jr. in 62 Harvard Law Review 1306, wherein he points out that when a statute outrages the sense of fairness of a court, the court will invalidate the statute under the "due process" clause. See also "The Sense of Injustice" by Edmond N. Cahn.

(i) Appellant seeks to show that the questions raised by this appeal are substantial. The act complained of tends to create chaos in the city where appellant resides and deprives him of representation in six of the departments administering the affairs of the city. Said act gives less weight to appellant's vote than to the votes of other electors, thus depriving him of the equal protection of the law. The said act deprives the majority of the electors of New Orleans of the privilege of selecting their government and vests that privilege in a minority. The said act gives to voters residing in one ward of the city the power to elect an official to govern the entire city, constituted of seven-

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teen wards, even though less than five per cent of the voters of the city reside in the ward in question. Appellant resides in another ward which it grouped with two other wards to form a municipal district. By all of which appellant feels aggrieved and feels said grievances to be substantial.

(j) The constitutional issues set forth herein were raised by the appeal to the Court of Appeal for the Parish of Orleans and were urged in the brief and in the oral argument of counsel for appellant before the Court of Appeal for the Parish of Orleans. They are, likewise, urged in the petition for a writ of certiorari or review to the Supreme Court of the State of Louisiana. These issues, under the Federal Constitution, were considered by the Court of Appeal for the Parish of Orleans as appears in the decision of the said Court of Appeal which forms part of the record to be transmitted to the Supreme Court of the United States. The Supreme Court of the State of Louisiana gave no reasons for its refusal to grant a writ.

Respectfully submitted,

(S.) GEORGE A. DREYFOUS,
Attorney for Appellant.

APPENDIX "A"

No. 19449

COURT OF APPEAL, PARISH OF ORLEANS, STATE OF LOUISIANA

NICK TEDESCO, *Plaintiff-Appellant,*

vs.

BOARD OF SUPERVISORS OF ELECTIONS FOR THE PARISH OF ORLEANS, et al., *Defendants-Appellees*

Appeal from the Civil District Court for the Parish of Orleans, Division "C"; No. 289 905. Honorable Louis H. Yarrut, Judge

George Janvier, Judge

Dec. 12, 1949

Bolivar E. Kemp, Jr., Attorney General; Wm. A. Porteous, Jr., 2d. Asst. Atty. General; Chas. J. Rivet, Sp. Asst. to Atty. General, attorneys for Board of Supervisors of Election; Henry C. Keith, Jr. and Robert U. Blum, attorneys for other Appellees.

George A. Dreyfous, attorney for plaintiff-appellant.

Affirmed.

Nick Tedesco, alleging himself to be a resident of the Third Municipal District of the City of New Orleans and a qualified voter, duly registered from Precinct No. 22 of Ward Nine, and proceeding under the State Uniform Declaratory Judgment Act, brought this proceeding for the purpose of having declared unconstitutional Act 234 of 1948. In his original petition he did not pray for citation upon nor for judgment against any person, public official, or board. He merely prayed that a copy of the petition be served upon the Attorney General of the State, and that there be judgment declaring the said statute unconstitutional. Though there was no prayer for citation upon any

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person, public official, or board, there was written upon the last page of his petition an order which was duly signed by one of the judges of the Civil District Court.

This Order reads as follows:

> "Let the defendant, the Board of Supervisors of Elections in and for the Parish of Orleans, and each of the individual members thereof, namely: William A. Conkerton, William Farrell and Louis K. Knop, Jr., be cited to answer this petition.
>
> "Let Honorable Bolivar E. Kemp, Attorney General of Louisiana, be served with a copy of this petition."

Plaintiff alleged that the said statute is violative of section 16 of Article III of the Constitution of Louisiana of 1921 in that the title of the said act is not indicative of its object. He alleged also that the said act is violative of the provisions of section 17 of Article III of the Constitution of 1921 for two reasons:

> "(1) Section 2 of said statute purports to amend and reenact only sub-paragraph (i) of Section 4 of Act 159 of 1912 (as amended by Act 338 of 1936) without reenacting and publishing at length said Section 4.
>
> "(2) That Section 3 of said statute purports to amend and reenact only sub-paragraph (k) of Section 4 of Act 159 of 1912 (as amended by Act 338 of 1936) without reenacting and publishing at length said Section 4."

He alleged that the said act is violative of the Constitution of the United States and of certain amendments thereof in that it deprives him of his privileges and immunities as a citizen of the United States and of the State of Louisiana, in that it deprives him of the privilege of voting for "six of the Commissioners who are each vested with the respective duties of administering the affairs of one of the eight Departments in which the executive and administrative powers of the City of New Orleans are vested * * *." He alleged that for this reason the act violates the provisions of the Fourteenth Amendment of the Constitution of the United

States. He charged further that the act deprives him "of his liberty and property without due process of law in that residents of other districts, namely the first, second, fourth, fifth and seventh districts of the City of New Orleans are given greater representation in the Commission Council of the City of New Orleans in that approximately one-half of the people in the City of New Orleans reside in the Third and Sixth Districts of said City are to be represented by only two-sevenths of the Commissioners to be elected under said act."

He averred also that sections 2, 3, 4 and 5 of the said act are inconsistent with the provisions of Act 351 of 1948, which act was passed later at the same session and that therefore these sections are repealed by the later act.

In the alternative that sections 2, 3, 4 and 5 of the act are held to be constitutional, then he alleges that section 1 would be unconstitutional for the reason that it provides for the election of a Mayor and seven Commissioners, whereas the later statute, Act 351 of 1948, provides for the division of the government of the City of New Orleans into five departments, with the result that three members of the Commission Council will be without administrative duties or powers.

He alleged also that despite the manifest unconstitutionality and illegality of the said statute, the Board of Supervisors of Elections of the Parish of Orleans will undertake to conduct the General Election and that that Board should be judicially restrained from doing so.

In compliance with the order that the Board of Supervisors of Elections and each individual member thereof be cited, citations were issued directed to "The Board of Supervisors of Elections for the Parish of Orleans, thru its proper officer," "The Hon. Louis Knop, Jr.," "Hon. William A. Conkerton," "Hon. William Farrell," and a copy of the petition and order was served upon each of them and also upon Carroll Buck, Assistant Attorney General.

The three individuals named, to-wit: William S. Farrell, Louis Knop, Jr., and William F. Conkerton (incorrectly designated in the citation as William A. Conkerton), and the Board of Supervisors of Elections for the Parish of Orleans filed numerous pleas and exceptions, the said Board

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of Supervisors appearing "in so far as it is capable of so doing." All of the said defendants contended that the said Board is without capacity to stand in judgment; that there is no party defendant whatsoever before the Court; that the Court "cannot exercise jurisdiction" and that the "instrument filed by plaintiff is not such written demand as is required by law for the commencement of an action," and all contended that the instrument filed by plaintiff prays for no relief against them.

The petitioner then filed a supplemental and amended petition, in which he recited all of his originally made allegations and in which he prayed for citation upon the said Board and upon the individual members thereof, and in which he prayed for judgment in his favor and against the said Board and the individual members, declaring Act 234 of 1948 to be unconstitutional and void.

To this supplemental petition the three individual members of the Board and the Board itself filed exceptions identical with those originally filed, and the further plea that there could be no amendment to the original petition since the original petition was not sufficient to initate a proceeding of any kind.

James O'Niell, alleging himself to be a person above the age of majority and a resident of New Orleans, intervened and prayed for permission to join plaintiff and that there be judgment in plaintiff's favor.

After a trial, there was judgment dismissing the suit and plaintiff has appealed.

The three individual members of the Board and the Board itself, "so far as it is capable of doing so," answered the appeal praying that the judgment insofar as it dismisses the suit be affirmed, but that it be amended so as to maintain the various exceptions which were filed below.

Counsel for the exceptors state in their brief that it was not necessary that the exceptors answer the appeal, and that even had there been no answer we could, nevertheless, amend the judgment appealed from by converting it into a judgment maintaining all or some of the pleas or exceptions and dismissing the suit on the exceptions instead of on the merits. The latest expression of the Supreme

Court on the subject supports the view that the answer to the appeal was not necessary. See Succession of Markham, 180 La. 214, in which the Supreme Court said:

> "The rulings on all such exceptions may be considered on appeal without reference to whether the party, desiring a review of the ruling on the exception, has himself appealed or has filed an answer to the appeal of the opposite party. Entertaining this view, the decisions cited are overruled on the question under consideration, and we shall now proceed to review the ruling on the exception."

That conclusion is interesting in view of the fact that in at least nine other cases the contrary conclusion was reached, namely, City of New Orleans v. New Orleans Jockey Club, 115 La. 911, 40 So. 331; Oglesby v. Turner, 127 La. 1093, 54 So. 400; Chopin v. Freeman, 145 La. 972, 83 So. 210; Alfred Hiller Co., Ltd. v. Hotel Grunewald Co., Ltd., 147 La. 129, 84 So. 520; Siragusa v. Illinois Cent. R. Co., 152 La. 745, 94 So. 376; Dorset v. Thomas, 152 La. 60, 92 So. 734; Bogue-Chitto Gravel Co., Inc. v. Police Jury of Lafourche Parish, 11 La. App. 246; Keith v. Lee, 13 La. App. 309.

We are much impressed with the serious nature of the various pleas and exceptions, and were it not for the precedent which has already been set by the Supreme Court, we would have deemed it advisable to give study to those exceptions, and had we given serious study to them, we doubt that we would have found it possible to clear that hurdle and proceed to a consideration of the merits of the controversy. However, in a similar situation in which the same statute was under attack and in which the preliminary pleas and exceptions which are found here were also found the Supreme Court said:

> "Although the appellants are also re-urging most vigorously all of their exceptions to the rule issued against them to show cause why the injunction should not have been issued in this case, we have concluded to pretermit these exceptions and pass to the merits since this case involves issues that must be disposed of as

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expeditiously as possible in order that the primaries nominating those who will seek election as the city's officials may be timely and orderly held prior to the general election in April of 1950."

City of New Orleans v. Board of Supervisors for the Parish of Orleans, No. 38,576, decided October 29, 1949, not yet reported.

Guided by that precedent, we pass at once to the constitutional questions which are raised by the petitions.

It is our opinion that the issues raised by the contention that the statute violates the provisions of the State Constitution were all considered and passed upon by the Supreme Court in City of New Orleans v. Board of Supervisors of Elections for the Parish of Orleans, supra. As a matter of fact, in oral argument, counsel devoted no time to the discussion of the contention that the statute is violative of the State Constitution and devoted little space in their brief to this question.

The attacks which counsel for plaintiff contend are warranted by the Federal Constitution as amended are based on the idea that the right of suffrage is a privilege or an immunity which is granted or guaranteed by that Constitution, and that any attempt by a state to regulate or control that right is violative of the Federal Constitution or of some of the amendments thereof.

Almost from a time when "the memory of man runneth not to the contrary" it has been held that the right to vote is granted by each state to its citizens and that that right may be regulated by each state so long as the regulations do not produce unwarranted or unfair discrimination against any particular class or group of potential voters whose rights are protected by the Constitution as amended. As a matter of fact, there is nothing in the Federal Constitution, nor in the amendments, which even prohibits unfair discrimination, unless it be where a Federal election is involved, or unless it be where there is a discrimination which is expressly prohibited by the Fifteenth Amendment, or by the Nineteenth Amendment.

In Minor v. Happersett, 88 U. S. 162, the Supreme Court held that the right of suffrage is not granted to citizens by the Constitution of the United States, nor guaranteed by the Fourteenth Amendment and held,—of course at a time long prior to the Nineteenth Amendment which guaranteed women equal rights to vote,—that a provision in a State Constitution limiting the right to vote to male citizens is not violative of the Federal Constitution. The Court held that the right of suffrage is not one of the rights granted by the Federal Constitution, and that the Fifteenth Amendment does not grant or enlarge that right but merely requires that no state shall itself abridge that right because of race, color or previous condition of servitude. All that the Nineteenth Amendment does is to add that the right to vote, when granted by a state, shall not be abridged because of sex.

The charge that by the statute in question the plaintiff is deprived of a privilege or an immunity is based on the contention that by that statute plaintiff is permitted to vote only for the Mayor and for one of the Commissioners and not for the other Commissioners. Plaintiff says that he is entitled to vote for each one and not only is he not permitted to vote for all, but that those voters who live in the most heavily populated municipal districts are discriminated against because they are permitted to vote for only one Commissioner for each district, whereas the voters in each of the much smaller districts also vote for one Commissioner for each district. To illustrate the point, counsel for plaintiff points out that in the Fifth District, although there are about 8,508 registered voters, those voters have the privilege of electing one Commissioner, whereas the voters of the Third District, who are at the present time numbered at about 48,020, are permitted to elect only one Commissioner. It is contended that as a result the voters of the Third District are improperly discriminated against.

In the first place, we do not see that by this contention there is raised any question cognizable under the Federal Constitution for the reason, as we have said, that it is well settled that the right to vote in each State is given by the State and may be curtailed by the State or controlled by

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the State so long as there is no violation of the Fifteenth Amendment or of the Nineteenth Amendment of the Federal Constitution.

Counsel for plaintiff declare that the Supreme Court of the United States has indicated in two instances that a state may not pass such statute as that which is now before us. They say that that was so indicated in Breedlove v. Suttles, 302 U. S. 205, and Colegrove v. Green, 328 U. S. 549. Counsel for defendants, on the other hand, are of the opinion that those cases are authority for the view that there is no violation of any provision of the Federal Constitution, nor of the amendments thereof, unless there results a violation of the provisions of the Fifteenth Amendment, or of the Nineteenth Amendment.

We have read these cases and find them most confusing, but conclude that there is nothing in either of them to support the contention of plaintiff and that rather they support the view that unless a federal election is involved or unless there is involved a violation of the Fifteenth Amendment or of the Nineteenth Amendment, or unless such a statute brings about an unwarranted and unfair discrimination, there is nothing violative of the Federal Constitution. And we are not at all certain that even if there is an unwarranted discrimination there is a violation of the Federal Constitution, unless it be that the discrimination is based on sex, or race, or color, or previous condition of servitude.

When we come to consider the contention that there is a violation of the Fourteenth Amendment, we find that we cannot be convinced that that amendment is in any way violated by this statute. Again, we refer to the fact that the right to vote is not granted or guaranteed by the Federal Constitution. Therefore, we do not see how it can be said that where a State enacts laws controlling suffrage, the privileges and immunities of citizens of the United States are abridged unless, of course, we repeat, the statute in question in some way violates the Fifteenth Amendment or the Nineteenth Amendment. We do not see that it violates the Fourteenth Amendment. As a matter of fact, in a volume issued by the Superintendent of Documents of the Government Printing Office at Washington,

D. C., we notice that in the comments under the Fourteenth Amendment the case of Minor v. Happersett, supra, is cited as authority to the effect that the Fourteenth Amendment "did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had." See Constitution of the United States of America, Revised and Amended 1938, Amendment 14, p. 767, published by the Government Printing Office at Washington, D. C. To the same effect, see United States v. Cruikshank, 92 U. S. 542 and United States v. Reese, 92 U. S. 214.

There is nothing in this statute which arbitrarily deprives any one of his right to vote, and we do not see that there is any fundamental right in every citizen to vote for every person who may aspire to public office. If the contention is sound that every person who is entitled to vote must be given the right to vote for or against everyone offering himself for any elective position, then on what basis can be justified the present method of electing Justices of the Supreme Court from different districts, or how can we justify the method by which Judges of the Courts of Appeal for the First and Second Circuits are elected from different districts? How can we justify the election of Railroad Commissioners from the different districts? There are probably many other instances in which boards or commissions are composed of members elected from different districts where the voters of one district vote only for one member but are subject to the rulings of the entire body.

It may be, though we do not so hold, that if a statute should arbitrarily and without sound reason divide a municipality or any political subdivision into districts as was done here, possibly there would be a violation of the fundamental rights of the various voters.

But assuming that if there were any such unwarranted discrimination there could be an action under the State or the Federal Constitution to prevent it, we do not see that there is necessarily such unwarranted discrimination here. Whatever may have been the real reason which lay back of the enactment of this statute, whether the reason was

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political, or whether it was punitive, we must assume that the Legislature acted properly and on sound reason.

Counsel for defendants call attention to the fact that at the present time no one of the Commissioners was chosen from the downtown or lower districts of the City, and they call attention to the further fact that there are divergent groups, social and otherwise, who live in the various districts and counsel suggests that possibly a realization of the fact that some of these downtown groups are not represented on the present Commission Council led the Legislature to decide that some method should be adopted under which each of the various districts, however located, would be represented. We do not know that this was the reason, but it is a possible reason, and who can say that it is not a sound reason.

If it was, then there was no unfair discrimination.

We conclude that there is nothing in the statute violative of the State Constitution, nor of any of the provisions of the Federal Constitution nor of the amendments thereof.

The judgment appealed from is affirmed at the cost of appellant.

Affirmed.

Rehearing refused January 3, 1950.

Writs refused (120th applications) by Supreme Court, State of La., Feb. 13, 1950.

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